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No. 90-_____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is "deliberate by-pass" or "cause and prejudice" the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state proceedings?

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PETITION FOR WRIT OF CERTIORARI

Petitioner J.C. Keeney, Superintendent of the Oregon State Penitentiary (hereafter the "State"), respectfully prays that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and reverse its judgment.

OPINIONS BELOW

The court of appeals' opinion is reported as *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991). A copy of the opinion is attached as Appendix A. The district court's opinion and the magistrate's findings and recommendation are not reported. They are attached as Appendices B and C respectively.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision. 28 U.S.C. § 1254(1). Although the court of appeals remanded the case for further proceedings, that does not affect the Court's jurisdiction under section 1254(1). *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

STATUTES INVOLVED

Section 2254(d) of Title 28 provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof

were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved by the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when the proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent Tamayo-Reyes was engaged in a knife fight with his fiancée in a Portland, Oregon tavern. When a stranger attempted to intervene, Tamayo-Reyes turned, stabbed the stranger, and killed him. The state charged Tamayo-Reyes with murder. A lawyer was appointed to represent him. Because Tamayo-Reyes speaks Spanish but little or no English, an interpreter was appointed to assist the defense. Not only was Spanish the interpreter's native language, but he was also an attorney.

Tamayo-Reyes decided to plead no contest to the lesser charge of first-degree manslaughter. He signed a plea petition, which set out the crime to which he was pleading, the rights he was giving up, the maximum sentence, the sentence the district attorney recommended, and the factual basis for his plea. Paragraph 4 of the signed plea petition states:

> I told my lawyer all the facts and circumstances known to me about the charges against me. I believe

> that my lawyer is fully informed on all such matters. My lawyer has counseled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses I might have in this case.

Before the state trial court accepted the no-contest plea, it questioned Tamayo-Reyes' attorney about the plea petition. His attorney told the court:

> I had Mr. Sanchez [the interpreter] translate the English [plea petition] form, from English to Spanish, directly to the defendant in my presence. Mr. Sanchez went over the form with him in Spanish. I asked [Tamayo-Reyes] if he understood it. He indicated he did understand it, and did wish to proceed as we contemplate proceeding this morning.

(Dec. 14, 1984 Tr. 2). The state trial court then re-advised Tamayo-Reyes of his rights, found that he understood them, and concluded that Tamayo-Reyes knowingly and voluntarily waived them as part of a no-contest plea.[1]

After he pled no-contest and was convicted on the manslaughter charge, Tamayo-Reyes filed a state post-conviction petition to attack his conviction collaterally. Tamayo-Reyes' state post-conviction petition raised two claims, both of which rested on the allegation that the interpreter's Spanish translation had been inadequate. He

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[1] The state trial court found:

> Mr. Reyes understands all of the rights that I've gone over with him, and that are explained in the plea petition, and he's making a knowing and voluntary waiver of those rights and chose to plead no contest and accept the consequences of a conviction for manslaughter in the first degree.

(Dec. 14, 1984, Tr. 2).

contended first that the interpreter did not tell him that pleading no contest waived his right to a jury trial. Second, he contended that the interpreter did not explain the mental element of first-degree manslaughter.

Counsel was appointed, and the state post-conviction court held a trial to determine the merits of Tamayo-Reyes' claims. The full panoply of trial procedures—discovery, compulsory process, cross-examination—was available to Tamayo-Reyes, and his counsel took advantage of them. After hearing the evidence, the state post-conviction court held that Tamayo-Reyes' no-contest plea "was knowingly and voluntarily entered." It found that he "was properly served by an interpreter in the proceedings leading to his conviction." It also found that the "interpreter correctly, fully and accurately translated the communications between Petitioner and his [trial] attorney." Based on these factual findings, the state post-conviction court declined to vacate Tamayo-Reyes' conviction. The Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review.

On federal habeas, the district court denied Tamayo-Reyes' habeas petition. The district court concluded that the state post-conviction court's factual findings disposed of Tamayo-Reyes' federal claims. It found no reason why those findings should not be presumed correct. It rejected Tamayo-Reyes' claim that a new evidentiary hearing was required because his counsel failed to develop material facts at the state post-conviction hearing. It found that petitioner had not established that the failure was not due to his own inexcusable neglect.

The court of appeals reversed and remanded. *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1502. It reasoned that material facts were not adequately developed at the state post-conviction hearing—specifically, the way in which the interpreter translated the mental element of manslaughter. *Id.*, at 1500. The court of appeals held that federal courts need not defer to state court fact findings unless the failure to develop the material facts in state court was due to the habeas petitioner's deliberate by-pass. *Id.*, at 1501-1502. Under the Ninth Circuit's reasoning, the deliberate by-pass standard announced in *Fay v. Noia*, 372 U.S. 391 (1963), provides the applicable test when a habeas petitioner seeks to have the federal courts reconsider factual disputes the state court already has resolved. *Ibid.*

REASONS FOR ALLOWING THE WRIT

Before turning to the argument, it is perhaps helpful to frame the question presented. *Townsend v. Sain*, 372 U.S. 293, 312-313 (1963), recognized that an evidentiary hearing is not required in federal habeas if "the state-court trier of fact has after a full hearing reliably found the relevant facts." The Court identified six situations in which the state court's fact findings will not be considered reliable. *Id.*, at 313. One is when "the material facts were not adequately developed at the state court hearing." *Ibid.*

Basing the right to a federal evidentiary hearing on a habeas petitioner's failure to take advantage of state proceedings provides little incentive to take the state proceedings seriously. *Townsend* was not unaware of this risk but reasoned that the deliberate by-pass standard in *Fay v. Noia*, *supra*, decided that same day, struck the proper balance

between the state and federal interests. *Townsend v. Sain*, 372 U.S., at 317. *Townsend* accordingly held that a habeas petitioner's failure to develop facts in the state court proceedings would entitle him to a federal evidentiary hearing unless the failure was due to the petitioner's deliberate by-pass. *Ibid.*

Since *Townsend* and *Fay*, the Court has recognized that *Fay*'s deliberate by-pass standard is inconsistent with the doctrines of comity and federalism. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The deliberate by-pass standard provides criminal defendants with too little incentive to litigate their federal claims fully in state court, *id.*, at 90-91, and it gives too little deference to the notions of comity Congress intended to preserve when it adopted 28 U.S.C. § 2254(d), *see Sumner v. Mata*, 449 U.S. 539 (1981). The question thus presented by the Ninth Circuit's opinion is whether *Fay*'s deliberate by-pass standard or *Wainwright*'s cause and prejudice standard provides the proper test to determine when a habeas petitioner will be excused for failing to develop material facts in state proceedings. Having framed the question, this petition now turns to why the Ninth Circuit's answer warrants a grant of certiorari.

The Ninth Circuit's answer was to follow *Fay*. The breadth of the Ninth Circuit's holding gives one pause. Few trials are perfect, and it is difficult to imagine a case in which a federal habeas petitioner cannot think how his case could have been tried better in state court. If deliberate by-pass is the only bar to re-litigating factual issues in federal habeas, there will be few federal habeas actions that do not result in a new evidentiary hearing. New federal evidentiary hearings will be required in all cases that state court counsel inadver-

tently or purposefully failed to develop a material fact. The only time a new evidentiary hearing will not be required is when the petitioner himself "understandingly and knowingly" forewent putting the fact before the state court. 926 F.2d, at 1500.

The problem with the court of appeals' holding is not merely that it places a substantial burden on the federal courts and on States to re-litigate factual questions in federal habeas that the petitioner already had a full and fair opportunity to litigate in state court. Equally significant is the court of appeals' failure to give due regard to the doctrines of comity and federalism that have informed this Court's habeas decisions. The general rule, stated in 28 U.S.C. § 2254(d) and grounded in congressional concerns for comity, is that federal courts should defer to the state courts' resolution of the facts. *Sumner v. Mata*, 449 U.S., at 550; *Sumner v. Mata*, 455 U.S. 591, 597-598 (1982) (per curiam). If, however, a habeas petitioner has a right, absent deliberate by-pass, to a federal evidentiary hearing whenever a material fact was not developed adequately in state court, little will be left of either the general rule or of comity.[2] Similarly, one of the reasons for requiring complete exhaustion of state remedies will be defeated if a habeas petitioner is entitled to a new

[2] Section 2254(d) contains an exception to the deference due state court fact finding similar to the one at issue here. Subsection d(3) provides that the presumption of correctness does not apply if the petitioner demonstrates "that the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3). Section 2254(d) was enacted after *Townsend*. Nothing in its legislative history suggests that Congress intended to codify *Fay*'s deliberate by-pass standard. Rather, Congress' emphasis on comity in adopting the statute cuts against such an inference. *See Sumner v. Mata*, 449 U.S., at 550.

federal evidentiary hearing on showing only that he inadvertently failed to offer all material evidence at the state hearing. *See Rose v. Lundy*, 455 U.S. 509, 519 (1982) (one benefit of a complete exhaustion rule is that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review").

Finally, the Ninth Circuit's holding is at odds with the Court's holding in *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *Finley* held that a convicted defendant has no constitutional right to counsel on state collateral review and no claim of ineffective assistance of counsel. Under *Finley*, a habeas petitioner could not ask a federal district court to ignore the state court's fact findings on collateral review because his counsel negligently failed to develop a complete record. Yet, that is precisely what the Ninth Circuit's decision allows a habeas petitioner to do.

Not only is the Ninth Circuit's holding far reaching and significant, but it is incorrect. *Wainwright v. Sykes*, *supra*, expressly rejects *Fay*'s deliberate by-pass standard to the extent it applies beyond *Fay*'s facts. 433 U.S., at 88 and n. 12. After *Wainwright*, cause and prejudice, not deliberate by-pass is the proper test. It follows that *Wainwright* modified *Townsend* to the extent *Townsend* incorporated *Fay*'s deliberate by-pass standard.[3] *Wainwright*'s reasoning leads to the

[3] To be sure, *Wainwright* does not address this issue expressly. It held that the petitioner's failure to raise an issue in state court will bar him or her from litigating that issue in federal habeas absent cause and prejudice. But its limitation of *Fay*'s deliberate by-pass standard to the facts of that case necessarily modifies *Townsend* to the extent it incorporated *Fay*'s standard.

same result. *Wainwright* explains that the state proceedings should be the focus of the criminal defendant's efforts. If he or she has evidence that bears on a federal constitutional issue, then both the issue and the evidence should be presented to the state court. As *Wainwright* observed, "the state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." 433 U.S., at 90.

The Ninth Circuit never discusses *Wainwright*.[4] It observes in a footnote that "[t]he validity of the *Fay* standard has been questioned," an observation that is somewhat understated, but concludes that *Fay* has not been questioned "in this context, where the issue is whether *Townsend* requires a federal evidentiary hearing." *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1501 n.19. Although the Ninth Circuit does not cite any support for this latter proposition, it may be thinking of a Fifth Circuit case in which the court found that *Fay* not *Wainwright* governed whether a federal evidentiary hearing was required. The court reasoned:

> [T]he policies relied upon in [*Wainwright v. Sykes*, *supra*], federalism, comity and concerns for the orderly administration of criminal justice, do not apply when the prisoner has challenged the violations throughout the state process and the state has held proceedings directed at the constitutional claim reasserted in a federal habeas court.

[4]The State argued in both the district court and the court of appeals that *Wainwright* provided the applicable test and that even if it did not, petitioner had failed to satisfy the burden stated in *Fay*. (*See* Appellee's Brief 28-31 and n.13).

Guice v. Fortenberry, 661 F.2d 496, 507 n. 25 (5th Cir. 1981) (en banc). The Fifth Circuit thus concluded that comity and federalism need not inform a federal court's decision whether to defer to state court fact findings.[5]

The Fifth Circuit's reasoning is inconsistent with *Sumner v. Mata*, *supra*. *Sumner* establishes that issues of comity and federalism apply with the same force to state court fact findings as they do to the failure to raise issues completely. A contrary rule would make little sense. It would serve no purpose to hold a federal habeas petitioner responsible for raising an issue in state court (or show cause and prejudice for failing to do so) but not hold him equally responsible for putting all the material facts relevant to that issue before the state court.

The Ninth Circuit's rule, if it were allowed to stand, would subvert the reasoning in *Wainwright*, *Rose v. Lundy*, *supra*, and *Pennsylvania v. Finley*, *supra*. *Wainwright*, not *Fay*, provides the proper standard: The failure to develop material facts in states court will not entitle a habeas petitioner to a federal evidentiary hearing unless the petitioner can

[5] The Eleventh Circuit followed *Guice* in *Thomas v. Zant*, 697 F.2d 977, 982-83 (11th Cir. 1983). Although the Eleventh Circuit was not technically bound by the Fifth Circuit's holding in *Guice*, *see Bonner v. City of Pritchard*, 661 F.2d 1206, 1207-08 (11th Cir. 1981) (en banc) (establishing general rule that Eleventh Circuit only bound by those Fifth Circuit decisions handed down before September 30, 1981), the Eleventh Circuit judges formed part of the en banc Fifth Circuit court that decided *Guice*. It is not surprising that the Eleventh Circuit followed what was in effect its own decision. Since *Thomas*, other circuits have followed *Townsend*'s use of *Fay* without asking whether *Townsend* is still good law to the extent it incorporates the *Fay* standard. *Compare Smith v. Freeman*, 892 F.2d 331, 338-39 (3d Cir. 1989) (following *Fay* standard), *with Patterson v. Cuyler*, 729 F.2d 925, 928 n.2 (3d Cir. 1984) (adopting stricter standard); *see Rogers v. Israel*, 716 F.2d 1288, 1295 n.7 (7th Cir. 1984).

show cause and prejudice. The court of appeals should have either affirmed or remanded to the district court to test petitioner's claim under *Wainwright*'s standard.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Because the Ninth Circuit's decision is squarely inconsistent with *Wainwright*, the State respectfully suggests that summary reversal is appropriate.

Respectfully submitted,
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APPENDIX A

Jose TAMAYO-REYES,
Petitioner-Appellant,

v.

J.C. KEENEY, Respondent-Appellee.
No. 90-35315.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 10, 1991.
Decided March 4, 1991

Steven Jacobson, Asst. Federal Public Defender, Portland, Ore., for petitioner-appellant.

Rives Kistler, Asst. Atty. General, Salem, Ore., for respondent-appellee.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING, CANBY, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Jose Tamayo-Reyes appeals the denial of his habeas corpus petition, claiming the district court erred in refusing to grant an evidentiary hearing on whether his nolo contendere plea to manslaughter was unconstitutional. We reverse in part and remand because the district court improperly deferred to certain state court factual findings based on 28 U.S.C. § 2254(d) (1988), instead of holding an evidentiary hearing on the merits of Reyes's claim as required by

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

FACTS AND PROCEEDINGS BELOW

Reyes is a Cuban immigrant with little education and almost no knowledge of English. In 1984, he allegedly stabbed and killed a man in a bar fight. He was arrested, charged with murder, and provided with a defense attorney and interpreter.

Reyes's attorney, Mr. Tommy Hawk, decided Reyes should plead nolo contendere to Manslaughter in the First Degree. Or. Rev. Stat. § 163.118(1)(a) (1989). Reyes signed a plea form that explained in English the rights he was waiving by entering the plea. The state court then held a hearing to approve the plea, at which Reyes was represented by Hawk and his interpreter, Mr. Ben Sanchez. The judge asked Hawk and Sanchez if they had explained to Reyes the rights enumerated in the plea form and the consequences of pleading nolo contendere, and they answered in the affirmative. The judge then explained to Reyes in English the rights he would waive by his plea, asking Sanchez to translate for him. Reyes indicated he understood his rights and still wished to plead nolo contendere to manslaughter. The judge accepted his plea.

Two years later, Reyes collaterally attacked the plea in a post-conviction proceeding in the Oregon Circuit Court for the County of Marion. He alleged his plea had not been knowing and intelligent because Sanchez failed in several critical instances to translate accurately and completely for him. As a result, he claimed, he did not understand the purposes of the plea form or the plea hearing. He did not

know he was pleading no contest to manslaughter; instead he thought he was agreeing to be *tried* on the manslaughter count. He also contended his plea was invalid because Sanchez had not interpreted for him the mens rea element of manslaughter.[1]

Following the proceeding, the state court dismissed Reyes's petition. The state court of appeals affirmed without an opinion. *Reyes v. Keeney*, 88 Or. App. 187, 744 P.2d 1011 (1987). The state supreme court denied review. *Reyes v. Keeney*, 304 Or. 680, 748 P.2d 142 (1987). Reyes then petitioned the district court for a writ of habeas corpus, claiming he was entitled to an evidentiary hearing on whether his nolo contendere plea was unconstitutional.

The district court held that two findings by the state post-conviction court were dispositive of Reyes's claims, that these findings were presumed correct under 28 U.S.C. § 2254(d) (1988), and that therefore no evidentiary hearing was required, Reyes timely appeals.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253 (1988). We review de novo a district court's denial of a petition for a writ of habeas corpus. *Madera v. Risley*, 885 F.2d 646, 648 (9th Cir. 1989).

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[1]As we explain, we believe this last claim should be resolved by a federal evidentiary hearing.

ANALYSIS

I

The Substantive Legal Issues[2]

Our initial inquiry is whether Reyes's allegations, if proved, would establish the right to habeas corpus relief. *See Townsend*, 372 U.S. at 307, 83 S.Ct. at 754; *see also Nevius v. Sumner*, 852 F.2d 463, 466 (9th Cir. 1988), *cert. denied*, 490 U.S. 1059, 109 S.Ct. 1972, 104 L.Ed.2d 441 (1989). We are persuaded that Reyes makes the necessary allegations.

North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970), holds that the validity of a guilty or nolo contendere plea depends on whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Accord Mabry v. Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984); *Marshall v. Lonberger*, 459 U.S. 422, 436-37, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983).[3] Reyes

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[2]Reyes advanced two ineffective assistance of counsel claims in the state post-conviction court. When Reyes raised the claims again to the district court, the magistrate noted he arguably had failed to assert them in the state court of appeals. The magistrate overlooked the exhaustion defect, however, because he believed his denial of Reyes's claim that the plea was unconstitutional necessarily disposed of the ineffective assistance of counsel claims. On appeal, Reyes makes a single oblique reference to ineffective assistance of counsel, prompting the State to argue he has abandoned these claims. Reyes does not respond to this contention in his reply brief so we treat the ineffective assistance of counsel issues as abandoned.

[3]A nolo contendere plea is equivalent to a guilty plea in this context. *See Alford*, 400 U.S. at 37, 91 S.Ct. at 167; *see also Wallace v. Turner*, 695 F.2d 545, 548 (11th Cir. 1983).

advances two reasons why his plea of nolo contendere to manslaughter was not the product of an intelligent choice. The first is that Sanchez did not translate adequately the mens rea element of manslaughter. The second is that Sanchez did not translate adequately the plea form and the plea proceeding. We address these allegations in turn.

A. Translation of the Mens Rea Element of Manslaughter

In Oregon, Manslaughter in the First Degree is defined, in relevant part, as a "criminal homicide . . . committed recklessly under circumstances manifesting extreme indifference to the value of human life. . . ." Or. Rev. Stat. § 163.118(1)(a) (1989). Reyes alleges Sanchez failed to translate the mens rea element of this crime. At most, he claims, Sanchez told him only that manslaughter was "less than murder."

In *Henderson v. Morgan*, 426 U.S. 637, 646-47, 96 S.Ct. 2253, 2258, 49 L.Ed.2d 108 (1976), the Supreme Court invalidated a defendant's guilty plea to second-degree murder because he entered the plea without being informed that intent to cause death was an element of the offense. If Reyes indeed was told only that Manslaughter in the First Degree was "less than murder," the mens rea element of the offense was not adequately described to him, and he states a basis for overturning his plea. *See United States v. Bigman*, 906 F.2d 392, 394-95 (9th Cir. 1990); *Hayes v. Kincheloe*, 784 F.2d 1434, 1438-40 (9th Cir. 1986), *cert. denied*, 484 U.S. 871, 108 S.Ct. 198, 98 L.Ed.2d 150 (1987); *Williams v. Raines*, 783 F.2d 774, 775-76 (9th Cir. 1986); *Sober v. Crist*, 644 F.2d 807, 809-10 (9th Cir. 1981) (per curiam).

Henderson does not require that *every* element of the crime must be explained to the defendant; it establishes only that the defendant must be informed of the mens rea element. *Henderson*, 426 U.S. at 647 n. 18, 96 S.Ct. at 2258 n. 18; *see also Sober*, 644 F.2d at 809. Under Oregon's definition of Manslaughter in the First Degree, the terms "recklessly" and "extreme indifference" describe the mens rea element of the offense. Or. Rev. Stat. § 163.118(1)(a) (1989). The Oregon Supreme Court has held these terms are components of the same basic mental state, but that the "extreme indifference" language indicates more must be proved than mere recklessness.[4] Needless to say, the shades of legal meaning

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[4]Oregon defines "recklessly" as meaning:

> [T]hat a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Or. Rev. Stat. § 161.085(9) (1989).

The term "extreme indifference" is not defined in the statute, but has been interpreted by the Oregon Supreme Court:

> The Oregon Criminal Code defines four culpable mental states: intentional, knowing, reckless and criminally negligent. ORS 161.085(7)-(10). These statutes define neither extreme indifference to the value of human life nor the circumstances which may manifest such indifference. In the absence of a definition we determine the extreme indifference language does not create an additional culpable mental state. The language does however, require more than recklessness. We conclude that the jury must find not only recklessness but also conduct which in addition to recklessness, manifests extreme indifference to the value of

(continued...)

here are difficult even for English-speaking lawyers to differentiate. We do not believe, therefore, that *Henderson* demands a rigid, technically precise translation of the terms mentioned. However, if the general import of these terms was not adequately conveyed to Reyes, his nolo contendere plea was not knowing or voluntary.

We repeat our recent admonition that "'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.'" *Bigman*, 906 F.2d at 395 (quoting *Henderson*, 426 U.S. at 647, 96 S.Ct. at 2259); *cf. United States v. Goodheim*, 686 F.2d 776, 777-78 (9th Cir. 1982). Without expressing a view of when this presumption should attach as a general matter, we believe it is of limited relevance to this case. Even if we were to presume Hawk described to Reyes in English the mens rea element of manslaughter, there remains the critical issue of whether Sanchez accurately translated that communication. Without an adequate translation, Hawk's advice in English, no matter how lucid and complete, would not satisfy *Henderson*.

One might argue that whatever presumption exists concerning the completeness of attorneys' consultations with their clients should apply by extension to interpreters'

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[4](...continued)

> human life on the part of this defendant, as may be inferred from his conduct at the time of the events.

State v. Boone, 294 Or. 630, 651 F.2d 917, 919 (1963) (footnotes omitted).

translations of those communications. We are unprepared however, at least in the circumstances of this case, to confer upon the State the benefit of such a double presumption.

In sum, Reyes has alleged facts which, if proved, would establish a basis for habeas corpus relief.

B. Translation of the Plea Form and Plea Proceeding

Reyes's second claim is that Sanchez failed to translate accurately and completely (1) critical portions of the plea proceeding and (2) the plea form he signed in advance of the proceeding. As a result, Reyes asserts he had no idea what was happening at the hearing as the judge explained in English the nature of the impending plea and the rights he would waive by entering the plea. He also had no idea what he had agreed to by signing the plea form. In short, he did not understand that he was pleading nolo contendere to manslaughter and giving up his right to a jury trial. Reyes thus alleges a second set of facts which, if proved, would establish a basis for habeas corpus relief.

C. Determination Below

The state post-conviction court issued the following findings:

1. Petitioner's plea of guilty[5] was knowingly and voluntarily entered.
2. Petitioner was properly served by an interpreter in the proceedings leading to his conviction.

[5]The court here incorrectly labeled Reyes's nolo contendere plea a "plea of guilty."

3. The interpreter correctly, fully and accurately translated the communications between Petitioner and his attorney.
4. Petitioner has not sustained his burden of proof in regard to any of the allegations in his petition.
5. Representation by counsel was reasonable and effective under the circumstances.

The magistrate assumed Reyes's legal claims turned entirely on the credibility of his allegation that Sanchez "did not adequately translate the proceedings or convey the necessary information to [him]." In other words, he assumed the plea form, the plea proceeding, and Reyes's consultations with Hawk would have apprised an English-speaking defendant of his rights and alternatives, and would have enabled him to enter an intelligent plea.[6] The problem, if any, was with Sanchez's translations at each of the critical steps. The magistrate further found that the state post-conviction court's second and third findings, if accurate, were fatal to Reyes's allegation that the translations were insufficient. Finally, he decided that the two findings should be accorded the presumption of correctness under section 2254(d) that Reyes had failed to establish an exception to that presumption, and that

[6]We note that this assumption is itself questionable. There is little evidence in the record bearing on whether Reyes was afforded even an English language description of the mens rea element of manslaughter. We conclude later in this opinion that Reyes is entitled to a federal evidentiary hearing on whether Sanchez translated the mens rea element for him. At this hearing it shall be open to Reyes to challenge the premise that he was informed in English of this element, whether by his attorney, by the judge in the plea proceeding, or by some other medium such as a charging document.

no evidentiary hearing was required to further explore the basis of his claims.[7] The district court adopted the magistrate's opinion in all respects.

II

Applicability of Section 2254(d)'s Presumption of Correctness

The state post-conviction court found (1) "[Reyes] was properly served by an interpreter in the proceedings leading to his conviction." and (2) "[t]he interpreter correctly, fully and accurately translated the communications between [Reyes] and his attorney." Reyes argues as a threshold matter that these are not findings of fact and that therefore section 2254(d)'s presumption of correctness is inapplicable. *See* 28 U.S.C. § 2254(d) (1988); *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981) (*Sumner I*). His argument is meritless, as the district court found.

It is true that a state court's ultimate conclusion that a guilty plea was voluntarily and knowingly entered is a legal one, and is not presumed correct under section 2254(d). *Marshall v. Lonberger*, 459 U.S. 422, 431-32, 103 S.Ct. 843, 849, 74 L.Ed.2d 646 (1983). But the state court's finding in this case that Sanchez did an accurate and complete job of translating is purely one of "historical" fact. Reyes bristles at this suggestion, apparently because he believes a

[7]Section 2254(d) provides in relevant part that state court determinations "on the merits of a factual issue . . . shall be presumed to be correct" unless the habeas petitioner demonstrates one or more of eight enumerated exceptions apply. 28 U.S.C. § 2254(d) (1988).

finding that is largely dispositive of a legal claim necessarily is one of law. The Supreme Court has observed, however, that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller v. Fenton*, 474 U.S. 104, 113, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985). We therefore agree with the district court that the presumption of correctness applies here. As we explain, however, Reyes states an exception to the presumption on the first of his legal claims.

III

Whether an Exception to Section 2254(d)'s Presumption Applies and Whether a Federal Evidentiary Hearing is Required

A. The Relationship Between Townsend and Section 2254(d)

Courts traditionally have relied on *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), in determining whether a federal evidentiary hearing is required in a habeas corpus case.[8] *Townsend* decided before Congress enacted section 2254(d), requires a federal evidentiary hearing in a habeas corpus case under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as

[8]Several of our recent decisions have applied the *Townsend* standard to determine if the district court should have held an evidentiary hearing, but they provide little guidance in this case. *See, e.g., Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990); *Norris v. Risley*, 378 F.2d 1178, 1180 (9th Cir. 1989); *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.), *cert. denied*, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984).

> a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313, 83 S.Ct. at 757. A glance at section 2254(d) reveals Congress incorporated these six circumstances into its list of eight exceptions to the presumption of correctness. 28 U.S.C. § 2254(d) 1988).[9] Indeed, the

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[9]Under section 2254(d), the presumption will not apply if the petitioner demonstrates any of the following circumstances:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing.
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding.
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, (continued...)

Supreme Court has observed that in enacting section 2254(d) Congress "codified" the criteria set forth in *Townsend*. *See Miller v. Fenton*, 474 U.S. 104, 111, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985); *Patton v. Yount*, 467 U.S. 1025, 1031 n. 7, 104 S.Ct. 2885, 2889 n. 7, 81 L.Ed.2d 847 (1984); *Brewer v. Williams*, 430 U.S. 387, 395, 97 S.Ct. 1232, 1237-38, 51 L.Ed.2d 424 (1977); *cf. Cuyler v. Sullivan*, 446 U.S. 335, 341, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980) (stating Townsend was the "precursor" to section 2254(d).[10]

Based on a comment in Justice Marshall's dissent in *LaVallee v. Delle Rose*, 410 U.S. 690, 701 n. 2, 93 S.Ct. 1203, 1209 n. 2, 35 L.Ed.2d 637 (1973) (per curiam), several courts have reasoned that *Townsend* and its progeny control whether an evidentiary hearing is required, while section 2254(d) merely governs the burden of proof at such a hearing.[11] *See Thomas v. Zant*, 697 F.2d 977, 984-85 (11th

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[9](...continued)
> pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such a factual determination is not fairly supported by the record.

28 U.S.C. § 2254(d) (1988)

[10]For a thorough study of the relationship between section 2254(d) and *Townsend*, *see Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983).

[11]Justice Marshall's dissent states: "Section 2254(d) says nothing concerning when a district judge may hold an evidentiary hearing. . . . So far as I understand, the question whether such a hearing is appropriate on federal habeas corpus continues to be controlled exclusively by our (continued...)

Cir. 1983); *Fowler v. Jago*, 683 F.2d 983, 988 (6th Cir. 1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 363 (1983); *see also Richmond v. Ricketts*, 774 F.2d 957, 961 (9th Cir. 1985). While this may be true as a matter of form, it is still the case that the same basic criteria generally are employed in both the *Townsend* and section 2254(d) inquiries.[12] In most cases, through not in all, the inquiries will merge.[13]

B. Translation of the Mens Rea Element of Manslaughter

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[11](...continued)
decision in *Townsend v. Sain*, even after the enactment of § 2254(d)." *LaVallee*, 410 U.S. at 701, n. 2, 93 S.Ct. at 1209 n. 2. One commentator examined this statement and concluded that "unlike Townsend, [section 2254(d)] does not purport to define when a federal evidentiary hearing is mandatory, it appears merely to state a set of rather confused burden of proof rules to guide the district courts which are to hold such hearings." P. Bator, D. Meltzer, P. Mishkin, and D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1564 (3d ed. 1989).

[12]In one case, the Supreme Court treated the criteria in section 2254(d) and *Townsend* as if they were interchangeable:

> The habeas corpus statute, following this Court's decision in *Townsend* provides that, in general, 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , *shall be presumed to be correct,' and an evidentiary hearing not required.*

Ford v. Wainwright, 477 U.S. 399, 410, 105 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (emphasis added). *See also*, Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989*, 78 Geo. L.J. 699, 1420 n. 3383 (1990) (noting that *Ford* appears to assume section 2254(d) and *Townsend* are identical).

[13]As we explain later in this opinion, this case presents an example of how the tests in *Townsend* and section 2254(d) are not always coextensive.

Reyes argues three exceptions to section 2254(d) apply to this case, and that we should therefore not presume correct the state court's implicit finding that Sanchez translated for Reyes the mens rea element of Manslaughter in the First Degree. He also claims under the parallel criteria in *Townsend* that an evidentiary hearing is required to explore the validity of his plea.

(1) *28 U.S.C. § 2254(d)(6) and Townsend's Sixth Circumstance*

Section 2254(d)'s presumption will not apply if the petitioner "did not receive a full, fair, and adequate hearing in the State court proceeding." 28 U.S.C. § 2254(d)(6) (1988). Likewise, under *Townsend*, 374 U.S. at 313, 83 S.Ct. at 757, a petitioner is entitled to a federal evidentiary hearing if "for any reason it appears that the state trier of fact did not afford [him] a full and fair fact hearing." We consider these tests to be coextensive. *Cf. Harris v. Pulley*, 692 F.2d 1189, 1197 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (implying the tests are the same); *Fritz v. Spalding*, 682 F.2d 782, 785 (9th Cir. 1982) (same); *Finklen v. Estelle*, 506 F.2d 438, 440 (5th Cir. 1975) (same).

In the state post-conviction court, Reyes was represented by counsel and was provided with a full-blown hearing to contest his nolo contendere plea. His attorney, Mr. Ronald Hellewell, was permitted to introduce evidence and examine and cross-examine witnesses. There is no indication the court restricted Hellewell's ability to present the case, and Reyes points to no other defects in the proceeding which suggest it

was not full and fair. Section 2254(d)(6) and *Townsend*'s sixth circumstance therefore do not apply.[14]

(2) *Section 2254(d)(3) and Townsend's Fifth Circumstance*

Section 2254(d)(3) provides that the presumption of correctness will not apply where "the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3) (1988). Like section 2254(d)(3), *Townsend*'s fifth circumstance requires a petitioner to show "the material facts were not adequately developed at the state court hearing. . . ." *Townsend*, 372 U.S. at 313, 83 S.Ct. at 757. *Townsend* also requires, however, that the petitioner demonstrate the failure to develop material facts was not due to his "inexcusable neglect." *Id.* at 317, 83 S.Ct. at 759. Only then is the petitioner entitled to an evidentiary hearing. Section 2254(d)(3) and *Townsend*'s fifth circumstance are not coextensive and thus our inquiry is two-fold. *See Smith v. Freeman*, 892 F.2d 331, 338-39, 339 n. 13 (3d Cir. 1989); *Streetman v. Lynaugh*, 812 F.2d 950, 959 (5th Cir. 1987); *Tucker v. Kemp*, 776 F.2d 1487, 1491 (11th Cir. 1985), *cert. denied*,

[14]Reyes alleges Hellewell failed to develop the "heart" of his case, but this contention is more appropriately analyzed under section 2254(d)(3), which states an exception to the presumption of correctness where "the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3) (1988). The next section will address the applicability of this exception.

478 U.S. 1022, 106 S.Ct. 3340, 92 L.Ed.2d 743 (1986); *Thomas v. Zant*, 697 F.2d 977, 986 (11th Cir. 1983).[15]

We must first determine whether the material facts supporting Reyes's legal claim were adequately developed in the state post-conviction court. As we explain, we believe the material facts were not adequately developed.[16]

The evidence submitted to the state post-conviction court consisted of a transcript of the plea proceeding. Sanchez's deposition and affidavit and Hawk's affidavit. Reyes was the only person who testified. The hearing focused on Sanchez's translation of the plea form and plea proceeding. There was almost no factual development of Reyes's claim that Sanchez had failed to translate the mens rea element of Manslaughter in the First Degree. Mr. Hellewell, Reyes's post-conviction attorney, merely directed the court's attention to various sections of Sanchez's deposition, attempting with his limited knowledge of Spanish to point out the inadequacies of Sanchez's translations. The State objected to Hellewell's discussion on the ground that he was not qualified as an

[15]Two of our decisions arguably have assumed section 2254(d)(3) and *Townsend*'s fifth circumstance pose the same test. *See Fritz v. Spalding*, 682 F.2d 782, 785 (9th Cir. 1982); *Griggs v. Superintendent Anchorage State Jail*, 469 F.2d 87, 88 (9th Cir. 1972) (per curiam). Since *Fritz* and *Griggs* do not clearly stand for this proposition, we are not bound by them.

[16]The district court's opinion doe snot clearly indicate if it reached the issue of whether the material facts were adequately developed. The court may have resolved Reyes's claim based solely on the second prong of *Townsend* by finding inexcusable neglect. In any event, we exercise our discretion to address the issue now, rather than remand it to the district court. *See Aguon v. Calvo*, 829 F.2d 845, 848 (8th Cir. 1987).

expert witness and Hellewell's presentation of the issue quickly disintegrated.

Even if Hellewell had been able to make sense of the information contained in the deposition, that information was inadequate to resolve the legal issue presented. In the deposition Sanchez was asked how he had defined manslaughter for Reyes. He relied he had translated it as "less than murder." On further questioning, Sanchez could not remember how he had translated the term "indifference." Moreover, Sanchez was *never even asked* how he had translated the term "recklessness."

The following passage from the record of the post-conviction hearing details Mr. Hellewell's attempt to make use of the deposition:

> *[Hellewell:]* Also in the deposition of Mr. Sanchez on page 11 and 12 there was an exchange there between himself and me concerning vocabulary for these terms. The two most important terms under consideration while this case was being considered at the trial level were murder and manslaughter. Those terms are quite difficult to understand to someone not schooled in the law and having a precise legal definition. Further, they are not capable of interpretation in the Spanish language by any single word because they—
>
> *[The State:]* Your Honor, I'm going to have to object to this unless Mr. Hellewell's putting himself forth as an expert witness. He's trying to provide this Court with testimony in regard to the application of the Spanish language and I don't think that's proper.
>
> *[The Court:]* The Court is aware of Mr. Hellewell's ability to communicate in the Spanish language.

> *[The State:]* However, Your Honor, we could bring in I don't know how many experts that we can bring in, if he wants to present himself as a witness to talk about what the terms means that are put down here. He's contesting this witness's ability to interpret by his own interpretations, and unless he's going to go on the record as a witness to do that, which he's already rested, then that's fine, but he can't sit here and say what the meaning of Spanish words are that Mr. Sanchez has translated in his deposition.
>
> *[The Court:]* Does this appear in the evidence anywhere?
>
> *[Mr. Hellewell:]* Yes, Your Honor. I can solve this problem by relying strictly on the words printed here in the transcript beginning at line 3 on page 11. Mr. Sanchez replied, "Murder, that he had killed somebody without the right to do so." I'd like the Court to be aware that that is a fairly complete but not entirely complete description of the term as we use it in our statutes. Then moving down to the foot of that page, Mr. Sanchez did explain those same words in Spanish spelling the words for the reporter.
>
> Moving to page 13, beginning at line 8, I asked him to describe his word for manslaughter. He responded on line 9 in Spanish that then he himself translated to English "that it was less than murder."
>
> I submit to the Court that that is a very brief, very incomplete description of the term for manslaughter.
>
> Following on that page is his spelling for the reporter in Spanish of the words used, but his interpretation is there on line 9, that it was less than murder.
>
> *[The Court:]* But you just referred to page 13, and I think you were actually on page 12.

[Mr. Hellewell:] Oh, yes. I beg your pardon. Page 12.

Mr. Hellewell's brief and unilluminating reference to the Sanchez deposition hardly indicates the material facts surrounding Reyes's claim were adequately developed. Hellewell could have developed these facts by a number of means, but did not. For instance, Hellewell did not call Sanchez to testify.[17] Nor did he call an expert witness to give an opinion on the accuracy of Sanchez's interpretations. Most strikingly, though Hellewell put Reyes on the stand, he did not ask him any questions relevant to the claim.[18] The colloquy quoted above, and Sanchez's deposition, constituted the chief evidence before the court. This evidence sheds little light on whether the mens rea element of manslaughter was correctly defined for Reyes. Thus, under section 2254(d)(3), the material facts relevant to Reyes's claim were not adequately developed, and the presumption of correctness does not apply here.

Nevertheless, under *Townsend*, Reyes is not entitled to a federal evidentiary hearing if the failure to develop the facts adequately is attributable to his "inexcusable neglect."

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[17]As pointed out at oral argument, it may be that Sanchez has forgotten how he translated the mens rea element of manslaughter (assuming he did at all). However, Hellewell still might have asked Sanchez presently to define the relevant terms for the court; if Sanchez had been unable to render accurate translations in that setting, such testimony would have tended to support the theory that Sanchez's earlier translations were deficient.

[18]We do not mean to intimate Hellewell necessarily should have pursued one or more of these avenues in developing the facts. We list the above opinions only for purposes of illustration.

Townsend, 372 U.S. at 317, 83 S.Ct. at 759. The district court found such neglect, but we believe it applied the wrong legal standard in reaching this conclusion.

At first blush, it might seem that every negligent failure of counsel to develop material facts is "inexcusable." But *Townsend* and the circuit cases interpreting it establish the contrary.

The *Townsend* Court defined "inexcusable neglect" by reference to the standard for procedural default articulated in *Fay v. Noia*, 372 U.S. 391, 438-39, 83 S.Ct. 322, 848-49, 9 L.Ed.2d 837 (1963). *Townsend*, 372 U.S. at 317, 83 S.Ct. at 759. Thus, inexcusable neglect will be found only where the petitioner has "*deliberately bypassed* the orderly procedure of the state courts." *Fay*, 372 U.S. at 438, 83 S.Ct. at 848 (emphasis supplied). A "deliberate bypass" occurs when

> a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures. . . .

Id. at 439, 83 S.Ct. at 849.[19]

Townsend illustrates the narrowness of this standard. In *Townsend*, petitioner had confessed to murder after being injected with a drug that arguably rendered his confession

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[19]The validity of the *Fay* standard has been questioned in other contexts, see *Tacho v. Martinez*, 862 F.2d 1376, 1380 (9th Cir. 1988), and *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 907 (9th Cir. 1986), but not in this context, where the issue is whether *Townsend* requires a federal evidentiary hearing.

involuntary. In the state court, petitioner's counsel did not adequately develop the fact that this drug had "truth serum" properties. Some testimony was adduced concerning the drug, but not enough to enable the court to grasp its true nature. Because this factual development was crucial to petitioner's constitutional claim, he was held to have passed the first prong of the test. Applying the inexcusable neglect prong, the Court stated: "And the medical expert's failure to testify fully cannot realistically be regarded as Townsend's inexcusable default." *Townsend*, 372 U.S. at 322, 83 S.Ct. at 762. Cases interpreting *Townsend* have reasoned that this statement indicates mere negligent failure to develop the facts adequately will not constitute inexcusable neglect.

In *Streetman v. Lynaugh*, 812 F.2d 950 (5th Cir. 1987), for instance, petitioner's counsel in state court was unprepared to conduct the habeas case and therefore failed to develop crucial facts bearing on the voluntariness of petitioner's confessions. The court held this was not inexcusable neglect, observing that "[i]t is well established that counsel's failure to marshall crucial evidence underlying a federal claim because of insufficient preparation or other neglect does not constitute a deliberate bypass." *Id.* at 960. Likewise, in *Guice n. Fortenberry*, 661 F.2d 496, 597 (5th Cir. 1981), the court could not discern from the record why counsel had failed to develop certain facts, but it concluded there had been no tactical decision to avoid presenting the evidence:

> It appears more likely that, based on the inartful and scattershot nature of the various motions, the defendants and their attorneys did not appreciate fully the relevance of the missing evidence. Such neglect is not inexcusable within the meaning of *Fay v. Noia*.

Id.; *see also Smith v. Freeman*, 892 F.2d 331, 340 (3d Cir. 1989); *Rogers v. Israel*, 746 F.2d 1288, 1295 n. 7 (7th Cir. 1984). We follow the decisions in these cases.[20]

In the present case, the magistrate recognized Reyes had asserted in his habeas petition that Hellewell "'simply failed to realize that the record of the Spanish translation he was creating was inadequate [for the post-conviction court] to evaluate Mr. Sanchez's performance.'" Again, in his written objections to the magistrate's recommendation, Reyes stated:

> If there is anything clear form the record in this case, it is that petitioner made no knowing and intelligent decision not to offer fully developed testimony regarding the failures of Mr. Sanchez's attempts at translation during the post-conviction proceedings. Postconviction counsel clearly made attempts to develop the record as recounted in petitioner's previous submissions to this court. Those efforts were woefully inadequate. A simple reading of the transcript of the post-conviction trial, without more, reveals both the inadequacy, and the clear lack of any willful design to bypass state procedure.

It appears the magistrate and district court acknowledged the truth of these allegations, but held that, even if Hellewell was simply negligent in failing to develop the facts, this could amount to inexcusable neglect. They erred in this respect. The standard for inexcusable neglect is deliberate bypass, and the case authority we have discussed demonstrates that a

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[20]We have found no Ninth Circuit decision directly on point.

counsel's negligent failure to develop the facts does not constitute a deliberate bypass.

Accordingly, we hold Reyes is entitled to a federal evidentiary hearing on the question whether the mens rea element of Manslaughter in the First Degree was properly explained to him.[21]

In cases where the presumption of correctness applies, a petitioner at an evidentiary hearing must "establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d) (1988). But where, as here, the presumption has been rebutted, the petitioner need only prove his constitutional claim by a preponderance of the evidence. *See Smith v. Freeman*, 892 F.2d 331, 341 (3d Cir. 1989); *Thomas v. Zant*, 697 F.2d 977, 989 (11th Cir. 1983).

C. Translation of the Plea Form and Plea Proceeding

Reyes's second constitutional claim is that Sanchez did not adequately translate the plea form and the plea proceeding.

Our review of the record convinces us that none of the three asserted exceptions to section 2254(d), or their analogs in *Townsend* is available. First, the state post-conviction court afforded Reyes ample opportunity to contest the translations of the plea form and plea proceeding. *See* 28 U.S.C. § 2254(d)(6) (1988), and *Townsend*'s sixth circumstances. Second, the material facts surrounding these two issues were adequately developed. *See* 28 U.S.C. § 2254(d)(3) (1988),

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[21]In light of our resolution of this case we have no occasion to examine Reyes's third asserted exception, based on section 2254(d)(8) and *Townsend*'s second circumstance.

and *Townsend*'s fifth circumstance. Third the state court's findings here are fairly supported by the record. *See* 28 U.S.C. § 2254(d)(8) (1988), and *Townsend*'s second circumstance. A federal evidentiary hearing is not necessary to explore this claim further.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSE TAMAYO-REYES,	)	
	)	
Petitioner,	)	Civil No. 88-6061-E
	)	
vs.	)	
	)	
J.C. KEENEY,	)	OPINION
	)	
Respondent.	)	

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REDDEN, Judge:

BACKGROUND

Petitioner filed a habeas proceeding under 28 U.S.C. section 2254 alleging that his plea of no contest to a charge of manslaughter in the first degree was involuntary and that

he received ineffective assistance of counsel. Respondent moved for summary judgment which Judge Hogan granted. Petitioner requested an evidentiary hearing "in order to adequately develop the material facts relevant to the case." Judge Hogan denied this action.

Magistrate Hogan filed his Findings and Recommendation on January 5, 1990. The matter is now before me pursuant to 28 U.S.C. section 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. section 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert denied*, 455 U.S. 920 1982).

Petitioner has timely filed objections. I have, therefore, given the file of this case a de novo review. I ADOPT the Magistrate's Findings and Recommendation that respondent's motion for summary judgement (#10) be granted and petitioner's motion for an evidentiary hearing (#21) is denied.

DISCUSSION

Both of petitioner's claims are based on the contention that petitioner does not understand the English language and that the interpreter hired to intermediate between petitioner, his attorney and the court, did not adequately translate the proceedings or convey the necessary information to petitioner.

In petitioner's state post-conviction hearing, Judge Barber found that "petitioner was properly served by an interpreter" and "the interpreter correctly, fully and accurately translated the communications between petitioner and his attorney." Respondent argued that these findings (by Judge Barber) were

supported by evidence in the record and are binding on habeas review. Petitioner argued that the findings are not entitled to the presumption of correctness under 28 U.S.C. section 2254(d) and that he is entitled to an evidentiary hearing on the adequacy of the interpreter.

Judge Hogan held that the question of a voluntary plea is a question of law subject to review, but the historical facts and the inferences giving rise to those facts are entitled to a presumption of correctness. Petitioner objects to this conclusion arguing that the state court determination is not a "finding of historical fact but, rather, a legal or mixed factual-legal conclusion."

Judge Hogan is correct. He acknowledged in the paragraph prior to the one objected to by petitioner that "the question of a voluntary plea is a question of *law* subject to review in a section 2254 proceeding." (Emphasis added). He noted only that the underlying facts and inferences regarding those facts are entitled to a presumption of correctness. Judge Hogan relies on both the interpreter's affidavit and deposition which Judge Hogan found "supports the conclusion that petitioner was fairly apprised of the consequences of his plea."

Petitioner also objects to Judge Hogan's statement that the state court finding is "conclusive in this proceeding unless petitioner can establish entitlement to an evidentiary hearing under *Townsend*." (Citation omitted). Section 2254(d) states that a determination by a State court *shall presumed to be correct* unless the petitioner can demonstrate that one of eight listed conditions exist (ie, that the merits of the factual dispute were not resolved in the State court hearing), otherwise "the

burden shall rest upon the applicant to establish by *convincing evidence* that the factual determination by the State court was erroneous." Section 2254(d) (emphasis added). Here, Judge Hogan relies on the interpreter's affidavit, deposition and the state trial court record to conclude that there is ample evidence that petitioner's plea was knowing and voluntary.

The Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), holds that where the facts are in dispute, the federal court in habeas proceedings must hold an evidentiary hearing *if* the petitioner did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. "In other words a federal evidentiary hearing is required unless the state court trier of fact has, after a full hearing, reliable found the relevant facts." *Id.* at 312-13. *Townsend* then lists six circumstances where a federal court must grant an evidentiary hearing to a habeas applicant: if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence: (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. *Id.* at 313.

Judge Hogan then goes through the three *Townsend* factors identified by petitioner that he alleged entitled him to an evidentiary hearing. There are: (1) the material facts were not adequately developed; (2) he did not receive a full and

fair evidentiary hearing; and (3) the record does not support the factual findings. Petitioner argues that Judge Hogan confuses the 2254(d) factors and the *Townsend* factors. I disagree. Judge Hogan specifically analyzed each of the three *Townsend* factors that petitioner alleged applied to his case.

Petitioner next argues that Judge Hogan's analysis of the "full and fair hearing" factor is flawed. *Townsend* held that a petitioner does not receive a full and fair hearing when a state trial judge has made serious procedural errors in such things as the burden of proof. Or if a procedure used by the state trial court "appears to be seriously inadequate for the ascertainment of the truth. . . .," then the petitioner is allowed an evidentiary hearing.

Petitioner alleged that he was denied a full and fair hearing because "the heart of petitioner's case was not fully developed or presented." Petitioner does not allege that he was not provided an opportunity to develop his case, only that the case was not developed as he now thinks it should have been. Judge Hogan stated that he *reviewed the record* and found nothing to suggest that petitioner was "in any way precluded from offering expert evidence on the sufficiency of the translation in the post-conviction proceeding or otherwise developing his case." Under *Townsend*, this finding by Judge Hogan is sufficient to rule that an evidentiary hearing is not mandated.

Finally, petitioner objects to Judge Hogan's analysis finding that the material facts were adequately developed at the state court hearing. Judge Hogan correctly recites the standard in *Townsend* that in order to establish entitlement to an evidentiary hearing on this ground petitioner must demon-

strate that the failure to develop the crucial evidence was not attributable to inexcusable neglect. *Townsend* at 317. Petitioner argued in front of Judge Hogan that "apparently petitioner's post-conviction counsel simply failed to realize that the record of the Spanish translation he was creating was inadequate to evaluate [the interpreter's] performance." Judge Hogan concluded that that argument did not demonstrate that the failure to adequately develop the record was not attributable to inexcusable neglect.

Petitioner objects to that conclusion stating that Judge Hogan did not analyze or discuss the meaning of "inexcusable neglect" as a legal standard. However, Judge Hogan cited *Townsend* which cites *Fay v. Nola*, 372 U.S. 391, 438-39 (1963), where the term originated as used in this context. I find that is sufficient.

CONCLUSION

I ADOPT Judge Hogan's Findings and Recommendation in their entirety.

Dated this 5 day of March, 1990.

/s/ James A. Redden
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSE TAMAYO-REYES,	)	
	)	
Petitioner,	)	Civil No. 88-6061-E
	)	
v.	)	FINDINGS AND
	)	RECOMMENDATIONS
J.C. KEENEY,	)	
	)	
Respondent.	)	

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HOGAN, Magistrate:

Petitioner filed this proceeding under 28 U.S.C. § 2254 alleging that his plea of no contest to a charge of manslaughter in the first degree was involuntary and that his trial counsel was ineffective. Both of petitioner's claims are based

on the contention that petitioner does not understand the English language and that Mr. Sanchez, the interpreter hired to intermediate between petitioner, his attorney and the court, did not adequately translate the proceedings or convey the necessary information to petitioner.

Both the involuntary guilty plea claim and the ineffective assistance of counsel claim arise out of the same basic contention regarding the alleged inadequate interpretation of the proceedings. Therefore, the fact that petitioner arguably did not properly preserve his ineffective assistance of counsel claim on appeal to the Oregon Court of Appeals in irrelevant. The voluntariness issue was before the Court of Appeals.

Respondent moves (#10) for summary judgment. Petitioner moves that "an evidentiary hearing . . . be held in order to adequately develope the material facts relevant to the case." Memorandum in Opposition (#21), p. 15.

Following petitioner's state post-conviction hearing, Judge Barber found that "petitioner was properly served by an interpreter" and "(t)he interpreter correctly, fully and accurately translated the communications between petitioner and his attorney." Respondent's Return and Motion to Dismiss (#4), Exhibit C, p. 2.

Respondent contends that the findings by the post-conviction court are supported by evidence in the record and are binding on this court on habeas review. Petitioner argues that these findings are not entitled to the presumption of correctness under 28 U.S.C. § 2254(d) and that he is entitled to an evidentiary hearing on the adequacy of the interpreter.

The question of the voluntariness of a plea is a question of law subject to review in a section 2254 proceeding.

Marshall v. Lonberger, 459 U.S. 422, 431 (1983); *Iaea v. Sunn*, 800 F.2d 861, 864 (9th Cir. 1986). However, the historical facts and the inferences regarding those historical facts are entitled to a presumption of correctness. *Marshall v. Lonberger*, *supra*, at 431; *Iaea v. Sunn*, *supra*, at 864.

Petitioner's argument that findings are "in essence legal conclusions," Memorandum in Opposition (#21), p. 5, is not persuasive. If the proceedings were properly translated by Mr. Sanchez, petitioner's plea was not involuntary and his counsel was not ineffective. If the translation of the proceedings was inadequate, petitioner may be entitled to relief.

Due process is offended when a defendant is not fairly apprised of the consequences of his plea. See *Mabry v. Johnson*, 467 U.S. 504 (1984). In this case, the affidavit of Ben Sanchez (Respondent's Exhibit 104, p. 11) supports the conclusion that petitioner was fairly apprised of the consequences of his plea. See also Sanchez Deposition, Return and Motion to Dismiss (#4), Exhibit D, pp. 24-42. Thus the finding of the post-conviction court that petitioner's plea was knowing and voluntary is supported by ample evidence in the record. This finding was a determination after a hearing on the merits of a factual issue, 28 U.S.C. § 2254(d), and therefore conclusive in this proceeding unless petitioner can establish entitlement to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d). See *Sumner v. Mata*, 449 U.S. 539 (1981); *Sumner v. Mata*, 455 U.S. 591 (1982).

Petitioner argues that the state court findings are not entitled to a presumption of correctness and that he is entitled to an evidentiary hearing under *Townsend v. Sain*, *supra*, and

28 U.S.C. §§ 1, 3, and 8 because (1) the material facts were not adequately developed; (2) he did not receive a full and fair evidentiary hearing; and (3) the record does not support the factual findings.

I. Full and Fair Hearing:

28 U.S.C. § 3365(d)(2) and (d)(6) [the 3rd and 6th circumstances identified in *Townsend*] require an evidentiary hearing in a federal habeas corpus proceeding where the state court failed to afford the applicant a full and fair hearing. What constitutes a "full and fair hearing" has not been precisely defined. Arguably the full and fair hearing standard can be equated with a procedural due process requirement. See *Bashor v. Risely*, 730 F.2d 1228, 1232-1233 (9th Cir 1984). However, there is no clear authority for this position. It is clear that a federal hearing is not required if the habeas corpus applicant had an opportunity for a full and fair hearing in state court, whether or not he availed himself of it. *Neron v. Tierney*, 841 F.2d 1197, 1199 (1st Cir. 1988), cert. den. 109 S.Ct. 90, ___ U.S. ___.

Petitioner contends he was denied a full and fair hearing because "the heart of petitioner's case was not fully developed or presented." Memorandum in Opposition, p. 8. Petitioner does not allege that he was not provided an opportunity to develope his case, only that the case was not developed as he now thinks it should have been. There is nothing in the record to suggest that petitioner was in any way precluded from offering expert evidence on the sufficiency of the translation in the post-conviction proceeding or otherwise developing his case. Under these circumstances it

is not reasonable to conclude that the state court failed to afford the applicant a full and fair hearing.

Assuming that petitioner's alleged failure to adequately develope his translation argument on post-conviction in state court can be characterized as a waiver of a procedural right, petitioner has not established either cause and prejudice from the default, *Meeks v. Cabana*, 845 F.2d 1319, 1323 (5th Cir. 1988) or that the waiver was not attributable to petitioner's inexcusable neglect or deliberate by-pass. *Griffen v. Wainwright*, 760 F.2d 1505, 1516 (11th Cir 1985), citing *Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983).

II. Material Facts:

Petitioner also contends that the material facts concerning Sanchez's translation were not "adequately developed at the state court hearing." 28 U.S.C. § 2254(d)(3) [the 5th circumstance identified in *Townsend*]. However, in order to establish enforcement to an evidentiary hearing on this ground petitioner must demonstrate that the failure to develop the crucial evidence was not attributable to inexcusable neglect. See *Townsend v. Sain*, *supra* at 317. Petitioner argues that "(a)pparently (petitioner's) post-conviction counsel simply failed to realize that the record of the Spanish translation he was creating was inadequate to evaluate Mr. Sanchez's performance." Memorandum in Opposition (#21), pp. 14-15. This argument does not demonstrate that the failure to adequately develope the record was not attributable to inexcusable neglect.

III. Findings supported by the record:

The presumption of correctness will not be applied to factual findings "not fairly supported by the record." 28

U.S.C. § 2254(d)(8). As noted supra, the affidavit and deposition testimony of Ben Sanchez, Defendant's Exhibit 104, p. 11, and Exhibit D, pp. 24-42, supports the post-conviction court's finding regarding the adequacy of the translation.

SUMMARY: Based on all of the foregoing I find that the state court's finding of fact regarding the adequacy of the translation is entitled to a presumption of correctness and that petitioner is not entitled to an evidentiary hearing under *Townsend v. Sain*, or 28 U.S.C. § 2254(d). If the translation was accurate, and we are bound by the state court finding that it was, it follows that plaintiff was fairly apprised of the consequences of his plea and his plea of *nolo contendere* was voluntary. *Mabry v. Johnson, supra.*

Respondent's motion for summary judgment (#10) should be allowed and petitioner's motion for an evidentiary hearing (#21) should be denied.

DATED this 4th day of January, 1990.

/s/ Michael R. Hogan
UNITED STATES MAGISTRATE